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CHARLES ELMORE CROPLEY
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

THE TRAVELERS INSURANCE COMPANY, a Corporation,
Petitioner,
vs.
JOHN I. MAGILL, Conservator of ROY A. McCLINTIC, a Person of Unsound Mind,
Respondent.
No. 1031.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

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OPINION BELOW.

The opinion of the Court of Appeals is reported in 133 F. (2d) 709.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered February 23, 1943 (R. 340), and the petition for rehearing was denied April 7, 1943 (R. 367). Thirty days' stay of mandate was granted April 19, 1943 (R. 369, 370).

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. A., Sec. 347).

QUESTION PRESENTED.

The question presented is whether insanity excuses compliance with an insurance policy provision respecting disability benefits which requires notice and proofs thereof.

STATEMENT.

The petition for writ of certiorari sets out the facts and the issue involved, namely, whether insanity excuses the giving of notice and proof of disability. For brevity respondent does not set out a statement in extenso.

However, respondent submits that the instant petition **incorrectly** states that said United States Circuit Court of Appeals, in the opinion at bar, recognized that there was no controlling Missouri decision on the question involved.

As a matter of fact, the Court of Appeals in its opinion (R. 347, 348, 349) holds that under the Missouri law insanity excuses the giving of notice and proof.

ARGUMENT.

The Court of Appeals states (R. 348, 349) that the Missouri Supreme Court has not directly passed upon the question in construing the disability clause of an insurance policy and "is undoubtedly free to follow the rule that mental incapacity does not excuse noncompliance with the requirement of due proof of disability." But said Court of Appeals also states (R. 347) that this Court, in **Mutual Life Ins. Company of N. Y. v. Johnson**, 293 U. S. 335, cited Roseberry v. American Benevolent Association, 142 Mo. App. 552, 121 S. W. 785, as showing that Missouri is among those states which support the view that waiver of premium because of disability having been promised, subject to a condition as to notice, under a liberal construction of the requirement, such notice is merely modal or procedural and insanity excuses notice and proof even though the requirement was a condition precedent.

The Court of Appeals also cites **Hayes v. Equitable Life Assurance Society**, 235 Mo. App. 1261, 150 S. W. (2d) 1113, 1117, to support the Court's position that in Missouri insanity excuses notice and proof. Said Court of Appeals also holds that the trial court, in this Magill case, believed such to be the law (R. 349).

In addition to the Roseberry and Hayes cases, cited supra, there are also the cases of **Hayes v. Continental Cas. Co.**, 98 Mo. App. 410, 72 S. W. 135, and Randolph v. City of Springfield, 257 S. W. 449 (Mo. Sup. Ct.), 302 Mo. 33, which support the Missouri rule that insanity or incapacity **does excuse** the giving of notice and proofs. In the Randolph case, supra, the Missouri Supreme Court held that where notice of an accident is required by statute as a condition precedent to bringing suit against a

municipality, the giving of said notice is excused by reason of physical or mental incapacity to give the same.

In **Schoen v. American National Insurance Company,** 167 S. W. (2d) 423, l. c. 429, the St. Louis Court of Appeals, in the majority opinion, discusses the Roseberry case, which held that where insured was unconscious for three weeks, he was excused from complying with a policy condition requiring written notice to be given within ten days. The Court there said (l. c. 429):

> "To the same effect is the case of Hayes v. Continental Casualty Co., 98 Mo. App. 410, 72 S. W. 135, and the case of Hayes v. Equitable Life Assurance Society, 235 Mo. App. 1261, 150 S. W. (2d) 1113. **We think these cases are squarely in point in this case, and a mere reading of those cases and the authorities cited is ample authority for stating the rule in our State to be, that in insurance contracts, where a condition precedent to the insured's right of recovery for a disability insured against is that notice be given before a cause of action accrues, that such notice is excused in a case where the evidence shows that the insured was rendered incapable of giving such notice by reason of his mental incapacity caused by or accompanying the very thing insured against.**" (Boldface ours.)

Obviously, under the Missouri rule, notice and proofs are excused by insanity. Petitioner essays to change the Missouri law, which the United States Circuit Court of Appeals for the Eighth Circuit followed in deciding the instant case. Respondent thus disagrees with petitioner's charge (petition for certiorari, p. 7) that: "the Circuit Court of Appeals, Eighth Circuit, erred in failing to apply the Missouri law that the furnishing of proof of disability, under the policy in suit, is a condition precedent to liability, and consequently erred in holding that the

insanity of the insured rendered unnecessary the furnishing of said proof."

Likewise petitioner is in error in charging (petition for certiorari, p. 8) that the holding of the Court of Appeals fails to give force and effect to the Missouri law that the furnishing of proof is a condition precedent. The Missouri law is as stated above.

The cases cited in the petition for certiorari (p. 4) are all cases where there was no issue of insanity involved. It is like citing the case of Bergholm v. Peoria Life Ins. Co., 284 U. S. 489, which was relied upon by the petitioner in the Court of Appeals. This Court in the Johnson case, supra, held:

> "Bergholm v. Peoria Life Ins. Co., etc., is not apposite, there being no evidence in that case of incapacity, physical or mental, to give the prescribed notice."

In the Johnson case, supra, this Court recognized the distinction between the cases where there is no issue of insanity or incapacity to give the required notice and proof, and cases where there is insanity or incapacity so to do; the Court of Appeals in its opinion at bar (R. 347) expressly recognized the distinction made in the Johnson case, supra, and holds that in Missouri the rule is that insanity or incapacity excuses the giving of notice and proof.

Conclusion.

Respondent submits that it is unlikely that the Missouri Supreme Court will, in the future, change the present prevailing Missouri rule in deciding the Schoen case; that the United States Court of Appeals is not in error in following the present Missouri rule. Said court would have

erred if it had not done so and would have violated the rule stated in Erie R. R. v. Tompkins, 304 U. S. 64, and kindred cases. Since said court followed the Missouri rule, there is no reason for this Court to review the decision of said Court of Appeals.

Wherefore, respondent prays that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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